

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no. JA 11/21

In the matter between

CAPE GATE (PTY) LTD

Appellant

and

MOKGARA & TWO OTHERS

First Respondent

NOMSA MBILENI N.O.

Second Respondent

COMMISSION FOR CONCILIATION

MEDIATION & ARBITRATION

Third Respondent

Date heard: 29 March 2022

Date delivered: 29 April 2022

Coram: Coppin JA, Phatudi et Tokota AJJA

JUDGMENT

TOKOTA AJA

[1] The appellant (hereinafter sometimes referred to as Cape Gate) conducts a business of a steel and wire manufacturing. Messrs Abraham Mokgara, Sebata Mosia and Themba Tsolo were employed by the appellant before they were dismissed on 4 November 2016. The three former employees are cited as the first respondent and will be referred to as such in this judgment. They were members of the third respondent, a registered trade union recognised by the appellant, namely the Association of Mineworkers Construction Union, (AMCU). The first respondent employees were dismissed following disciplinary hearings. They referred a dispute of unfair dismissal to the third respondent for conciliation and mediation. The conciliation failed and the dispute was referred to arbitration. The second respondent issued an award in terms of which she declared the dismissals to have been procedurally fair but substantively unfair.

[2] The arbitration was concluded on 12 January 2018. The arbitrator directed the appellant to reinstate the first respondent employees retrospectively from the date of their dismissals without back pay. The first respondent employees were further directed to report for duty by the 10th of February 2018. The appellant approached the Labour Court and sought an order reviewing and setting aside the award. The Labour Court (per Moshoana J) dismissed the application with no order as to costs. With the leave of this Court, the appellant is appealing against the judgment and order of the Labour Court.

[3] The dispute before the arbitrator centred around the first respondent employees' involvement in negotiating, developing and distributing a document relating to the transfer of AMCU members from the Cape Negotiated Provident Fund (the Fund) to the Sanlam Umbrella Fund (Sanlam).

[4] The facts of this matter are to a large extent, not in dispute. On 5 August 2016, the first respondent employees, who were the representatives of AMCU, met with the appellant to discuss the issue of the transfer of their benefit from Cape Gate Provident Fund to Sanlam. At that meeting, the first respondent employees indicated to the appellant that they no longer wished to discuss the issue of the movement of the Fund with the appellant but would approach the Board of Trustees directly to discuss the issue.

[5] On 12 August 2016, the first respondent employees, instead of approaching the Board of Trustees as previously indicated, met with Mr Alwyn Anthony Jackson, an Employee Benefit Specialist employed by Sanlam. They were in the company of Ms Rusty Joubert, Sanlam's Financial Adviser. They sought advice regarding the transfer of the Fund in respect of ACMU members who were employed by the appellant. Their aim was to negotiate a transfer of their provident fund from negotiated Cape Gate Provident fund to Sanlam exclusively for members of AMCU. Mr Jackson responded and explained what the benefits would be and the requirements for such a proposed transfer.

[6] On 2 September 2016, Mr Jackson and the first respondent employees convened a second meeting where a draft transfer form was presented to them by

Mr Jackson. They reviewed the contents of the document and suggested an amendment to insert a field where each of the individual employee's company number could be inserted by hand when completing the form. After the amendment, the transfer form was approved by the first respondent employees.

[7] After the transfer form was approved by the first respondent employees, it was distributed to about 200 AMCU members. It is expedient to quote the content of the form as this will be relevant later in this judgment. The form reads thus:

'I the undersigned employee of Cape Gate hereby acknowledge that:

- Based on a request by AMCU Sanlam have(sic) been introduced and accepted as the second service provider giving the employees of Cape Gate a choice between two Provident Funds which they may join.
- I have been presented with all the facts needed to make an informed decision whether I would like to stay with the company's current provident fund administered by NBC Holdings or
- I am fully aware that the benefits will remain exactly the same.
- I elect to transfer to the new introduced provident fund administered by Sanlam with effect from 1 November 2016
- I choose to remain a member of the current provident fund administered by NBC Holdings.
- I fully understand that the move to the new provident fund will also include my accumulated fund credit from the current provident fund and that will be transferred to the new provident fund in terms of section 14 of the Pension Fund Act.

- I agree that the transfer cannot be finalised without completing the necessary documents required by NBC Holdings (Pty) Ltd and Sanlam.
- I further agree that I cannot transfer back to the provident fund administered by NBC Holdings (Pty) Ltd.

Member name & Surname

ID Number

Company number

Dated'

[8] The distributed forms were completed and signed by AMCU members during the period 4 to 13 September 2016. They all elected that the Fund be transferred to Sanlam with effect from 1 November 2016.

[9] During the period between 5 and 27 September, a series of correspondence in the form of emails was exchanged between the appellant and Sanlam. On 5 September 2016, Mr Alwyn Jackson addressed an email to one Sandra of the administrators informing her that Sanlam had engaged with AMCU regarding their movement of the Fund from the appellant to Sanlam. He informed her that only AMCU members have elected to transfer their Fund from the appellant to Sanlam with effect from 1 November 2016. He then requested Sandra to advise him of the necessary requirements in order to proceed with the preparations required in terms of section 14 of the Pension Act documents.

[10] On 7 September 2016, Mr Khasapane, a manager at Cape Gate, responded to Mr Jackson's email and stated that the issue of transfer of the Fund was never discussed with Cape Gate and further that it was 'blatantly premature' to demand any information from the administrators without the approval of the Board of Trustees. On the same day, Mr Jackson replied and stated that they were made to

believe that the matter had been discussed with Cape Gate and that the transfer was approved.

[11] On 8 September 2016, Mr Khasapane addressed another email to Mr Jackson expressing his bewilderment with the statement that Sanlam had been led to believe that the issue had been discussed with the management of Cape Gate. He expressed his concerns and made it clear that they were caught off guard as the employees were demanding answers. He then requested Mr Jackson to furnish him with the names of the employees who were involved in the negotiations. Mr Jackson responded on the same day and gave him the names of the first respondent employees, including one Francis Mohlasi who was also subsequently dismissed but did not participate in this appeal.

[12] On 13 September 2016, a circular letter was sent to all employees of Cape Gate informing them that the company was never involved in the proposed transfer of the Fund to Sanlam and therefore no approval was obtained from it.

[13] On 14 September 2016, the first respondent employees together with Mohlasi were suspended from duty pending further investigations.

[14] On 23 September 2016, Mr Jackson addressed an email to Mr Khapasane informing him that they had received 200 option forms from AMCU members and were anxious to finalise the matter as a matter of urgency. He stated that there was great excitement amongst the AMCU members to transfer the Fund to Sanlam by 1 November 2016.

[15] It is not necessary to traverse the trail of all the emails that were exchanged. But it is sufficient to say that the central theme of the emails was that Cape Gate was not pleased by the manner in which the first respondent employees and Sanlam handled the issue. For this reason, the first respondent employees together with Mohlasi were charged with misconduct.

The following charges were preferred against the first respondent employees:

‘Charge 1

1. Dishonest conduct in that during August 2016 you unlawfully and without permission of the Company placed its logo on an unauthorised document.
2. You then proceeded to use such document under false pretences and created the impression with your members that the Company agreed to support your application to have their retirement funds transferred to a new service provider. (Code 4.7)

Charge 2

Fraudulent and dishonest behaviour in that during August 2016 you falsely presented yourselves in discussions and/or negotiations with Sanlam that-

- 3 The Company has authorised you to participate in such discussions or negotiations;
- 4 The Company has authorised you to act on its behalf;
- 5 The company has approved the transfer of the retirement funds.

(Note 11 to Code).’

[16] They were all found guilty as charged and were dismissed. The arbitrator found that the first respondent employees were guilty of the second part of the first charge but that they were not guilty of the second charge. She found that in respect of the sanction the first respondent employees did not act dishonestly and therefore the sanction of dismissal was ‘too harsh’. For this, she relied on what was held in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) ((2007) 28 ILJ 2405; 2008 (2) BCLR 158; [2007] 12 BLLR 1097; [2007] ZACC 22); and *SACCAWU obo Mokebe and Others v Pick 'n Pay Retailers* (JA36/16) [2017] ZALAC 55; [2017] 12 BLLR 1196 (LAC); (2018) 39 ILJ 201 (LAC) (26 September 2017). She found that the dismissals were procedurally fair but

substantively unfair hence her award requiring the reinstatement of the first respondent employees.

[17] The Labour Court held that charge one was inseparable and therefore all the elements of the charge should have been proved before a finding of guilt could be returned. It concluded that a verdict of not guilty was returnable. In paragraph 9 of his judgment, the learned Judge stated:

‘Properly considered the second part of the charge had in it the false pretence element. The conclusion reached by the second respondent [arbitrator] is that the evidence failed to prove the alleged false pretence. The question that immediately arise[s] is whether a commissioner is empowered to recraft a charge for an employer and thereafter find the employee guilty of the recrafted charge. In my view a commissioner is not empowered to do so. An employer is not entitled to justify a dismissal by using a charge that did not lead to a dismissal. Similarly, a dismissal cannot be justified by a charge recrafted by a commissioner. Appropriately, since not all the elements of the second part of charge one were proven, a finding of not guilty was returnable. The employees and their trade union did not launch a counter review. If anything this erroneous conclusion affects them more than the applicant...’ [Footnotes omitted].

The Labour Court reasoned, however, that despite the error committed by the arbitrator the outcome of the award was not affected.

[18] This appeal is concerned with the first charge against the first respondent employees. Mr Petlane, who appeared for the first respondent employees, argued that the form that was completed by the AMCU members was simply meant to be a survey. It was not meant to be a conclusive proof of the agreement between Sanlam and Cape Gate to transfer the Fund to Sanlam. I cannot agree. If any advice was sought from Sanlam it could have been during the first meeting. It is clear that the second meeting was for the implementation of the advice hence the designed forms were finalised. The form contained:

- (a) Two logos i.e that of the Cape Gate and Sanlam;
- (b) It is stated in the form that a request has been made to Sanlam for the transfer of the Fund and Sanlam has accepted the request;
- (c) The form states that all the facts needed by the employees have been given to them to make an informed decision;
- (d) The employees are given a choice to remain with Cape Gate Fund or to transfer the Fund to Sanlam and they made a choice to transfer the Fund to Sanlam with full knowledge of the implications thereof;
- (e) The employees are required to choose a cut-off date by which the Fund must be transferred, i.e 1 November 2016; and
- (f) Lastly, they are required to agree that the decision they make to transfer is irreversible.

[19] In my view, the members of AMCU were presented with the forms as a *fait accompli* instead of being called upon to give their opinion about the change. What was required of them was to simply take a decision to transfer the Fund or elect to remain with Cape Gate Fund. It is common cause that the form was misleading. The presence of the logos, the cut-off date for the transfer of the Fund and the notion that the decision is irreversible gave the impression that the whole issue had the approval of Cape Gate. According to Mr Jackson, there was “great excitement” amongst the AMCU members and they were anxious to finalise the transfer as matter of “urgency”.

[20] The arbitrator found that the information contained in the form was misleading. This finding cannot be faulted. She held that the first respondent employees had a duty to correct the misleading information for their members, but they failed to do so. This has been interpreted by the Court *a quo* as being a finding on ‘negligence’, which negated an intention to mislead the members. The Court

reasoned that the employees were not charged with 'negligence but dishonesty and it must also follow that negligence did not lead to the dismissal of the employees.'

[21] I accept that the charges were not elegantly drawn. It must be borne in mind that Cape Gate is not a court of law. A disciplinary tribunal is not a court of law and the drawing of charges needs not form a model of criminal charges. It is sufficient if the employee is informed of the allegations against him to prepare for the hearing.¹ What is necessary is that sufficient particulars of the charges preferred against an employee, which must be covered in the rules of conduct of the company concerned, must be alleged.² In a similar, but different context, in *Young Ming Shan CC v Chagan NO and Others* 2015 (3) SA 227 (GJ) paras.44-45 the court there expressed similar sentiments in respect of rental Tribunal. This is also demonstrated by the fact that proceedings of the disciplinary Tribunal are valid even if conducted in the absence of the offender. Furthermore, there are no stringent rules relating to the crafting of charges and leading of evidence. The employee must be given an opportunity to prepare and be heard.

[22] The Labour Court held that the arbitrator recrafted the charges to refer to negligence which is the opposite of dishonesty and can never serve as a competent verdict. I do not agree. First, the arbitrator did not make a finding that the first respondent employees were guilty of negligent conduct. Second, the employees were fully aware of the allegations against them which formed the basis of the charges. It is not about proving all the elements of an offence. All what is required is to prove the essential allegations which form the basis of the misconduct concerned.

[23] As I see it, the essence of the charges is that the first respondent employees negotiated a transfer of AMCU members' Fund to Sanlam in circumstances where they were aware that they were not authorised to do so. They further gave the impression to Sanlam that Cape Gate was aware of their conduct. They then by false

¹ *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JA4/18) [2019] ZALAC 57; (2019) 40 ILJ 2477 (LAC); [2019] 12 BLLR 1304 (LAC) (15 August 2019).

² *Woolworths (Pty) Ltd v CCMA and others* (2011) 32 ILJ 2455 (LAC) paras 32-33; *Pailprint (Pty) Ltd v Lyster N.O and Others* (DA18/2017) [2019] ZALAC 43; (2019) 40 ILJ 2047 (LAC); [2019] 10 BLLR 1139 (LAC) (13 June 2019) para 18; *First National Bank, a Division of FirstRand Bank Ltd v Language and Others* (DA 4/2012) [2013] ZALAC 23; (2013) 34 ILJ 3103 (LAC) paras 22-23.

pretences misled their members into believing that their conduct had been approved by Cape Gate since there was even a logo for Cape Gate and a cut-off date by which the transfer should take place.

[24] Mr Jackson from Sanlam testified that his engagement with the employees was based on his belief that “everything was above board with the employer’s consent”. He was cross-examined exhaustively about the consent of the appellant and was throughout adamant that he thought there was consent hence at the second meeting with the first respondent employees he inserted both logos for the employer and AMCU. He testified that he was under the impression that the consent aspect had been discussed with Ms Rusty Joubert and he was merely asked to facilitate the move.

[25] Furthermore, the history of this dispute commenced as far back as 2013. AMCU members wanted their provident Fund to be transferred from the employer’s fund to Sanlam. The appellant refused to transfer the benefit to Sanlam. That dispute culminated in the Pension Funds Adjudicator who ruled in favour of the employer on 5 June 2014. The Tribunal said: “[t]his Tribunal is satisfied that the first respondent’s[i.e. Cape Gate’s] refusal to transfer the benefits of the complainants to the Sanlam Umbrella fund is in line with its rules and the Act. Therefore this complaint should be dismissed.”

[26] Consequently, this was a deliberate attempt once more to resuscitate the move to transfer the Fund to Sanlam by back door negotiations. They were successful in raising hopes with their members. The fact that this was an abortive attempt is neither here nor there. In my view, there was an intention to mislead AMCU members into believing that finally the issue had been resolved with Cape Gate and therefore they could make a choice hence they were excited and wanted the transfer as a matter of urgency. In my opinion the Labour Court, therefore, erred in regarding the conduct as being mere negligence.

[27] With regard to the sanction, the arbitrator held that the sanction of dismissal was ‘too harsh’. It has been held by this Court that the question of a sanction lies

primarily with the discretion of an employer.³ It is not for the arbitrator or the Court to decide that it is “harsh”. The appropriateness of the sanction is measured by fairness. In *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) (2007) 28 ILJ 2405; 2008 (2) BCLR 158; [2007] 12 BLLR 1097; the Constitutional Court confirmed that the decision to dismiss belongs to the employer, but the determination of its fairness does not. ‘Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace.’ This does not mean that the Commissioners in determining whether a dismissal was fair should approach the matter on the basis of what decision they would have made had they been the employer. Fairness is determined on the basis of the facts and circumstances of each case bearing in mind the reasonableness of the rule.

[28] In view of the fact that the arbitrator determined fairness of the dismissal on the erroneous belief that an element of dishonesty was absent, her decision was unreasonable. The first respondent employees’ conduct was intolerable. They knew full well that the transfer of the Fund had been dealt with by the Pension Fund Adjudicator and nothing was done about that decision. It was therefore not open to them to raise hopes to their members about something which they knew was not approved. Their conduct created tensions hence the employer was under pressure from the employees seeking answers. Accordingly, the review should have succeeded.

[29] Concerning costs, the rule is that unless fairness and law dictate otherwise no order as to costs should be made in matters of this nature. I see no reason to deviate from that rule.

[30] In the result, the following order is made.

1. The appeal is upheld;

³*Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC): *dictum* in para [33]; *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* (1999) 20 ILJ 1701 (LAC) in para [28].

2. The order of the Labour Court is set aside and is substituted with the following order:

“(a) The review succeeds;

(b) The award is reviewed and set aside;

(c) It is declared that the dismissals of the respondents were both procedurally and substantively fair;

(d) There is no order as to costs.”

3. There is no order as to costs.

B R Tokota

Acting Judge of the Labour Appeal Court

Coppin JA and Phatudi AJA concurred.

APPEARANCES:

FOR THE APPELLANT:

M Edwards

Instructed by

Cliffe DekkerHofmeyr Inc

FOR THE RESPONDENT:

M M Petlane

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